

Disability under the Light of the Court of Justice of European Union: Towards an
expansion of the protection of Directive 2000/78?

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1.- Introduction

Discrimination on the grounds of disability has been one of the most important topics in anti-discrimination law in recent years. The treatment of disability has been a story of intellectual borrowings, which actively facilitates the mutual exchange of transatlantic and even international ideals of justice¹. The clear example of this phenomenon has been the paradigm shift regarding models for the treatment of disability. The medical model, which understands that disability is a medical and individual problem², has gradually been replaced by the social-contextual model of disability³.

Although from a European legal point of view this turnaround has been apparent since 1996⁴, the role of the Court of Justice of the European Union (hereinafter, CJEU) in the interpretation of Directive 2000/78 and the Convention on the Rights of Persons with Disabilities (hereinafter, CRPD) has been more progressive and less clear. Given this scenario, this paper seeks

¹ QUINN, G.; FLYNN, E., "Transatlantic Borrowings: The Past and Future of EU Non-Discrimination Law and Policy on the Ground of Disability", *American Journal of Comparative Law*, vol. 60, 1, 2012, p. 23.

² OLIVER, M., *Understanding Disability*, Macmillan Education UK, London, 1996, p. 31.

³ This paradigm refuses the individual assumption of the responsibility of disability, and views disability as a difficulty of society to provide accessibility for people with impairments. The United Nations Convention on the Rights of Persons with Disabilities is the legal keystone of its implementation.

For a further discussion of the social contextual model of disability, see PALACIOS, A., *El modelo social de la discapacidad: orígenes, caracterización y plasmación en la Convención Internacional sobre los Derechos de las Personas con Discapacidad*, Madrid, Cinca, 2008; STEIN, M.A., "Disability Human Rights", *California Law Review*, vol. 95, 2007, pp. 87-91; BICKENBACH, J. *et al*, "Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps", *Social Science & Medicine*, no. 48, 1999, p. 1173-1187.

⁴ The communication of the Commission on equality of opportunity for people with disabilities [COM (1996) 406] was one of the most important resolutions, but the keystone standard has been Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

to analyze European protection of disability in the light of the CJEU, and specifically, whether the disability protection *ex* Directive 2000/78 and Convention on the Rights of Persons with Disabilities have been expanded. To examine this issue, the methodological approach will focus on the analysis of the most important judgments ruled by the CJEU. It is important to clarify that only the judgments that have most significantly affected the concept of disability, as well as the configuration to provide reasonable accommodation, will be examined⁵.

2.- The approach to judicial protection of disability before CRPD: Chacón Navas Judgment and Coleman Judgment

The first judgment analyzing the concept of disability was the Chacón Navas Judgment, C-13/05, ECLI: EU: C: 2006: 456⁶. The questions referring to the preliminary ruling were intended to determine the scope and characterization of the concept of a person with a disability as stated in Directive 2000/78. In particular, the central point of this resolution was to clarify whether sick workers can be included within the definition of a person with a disability *ex* Directive 2000/78.

The facts were based on the dismissal of a worker after her declaration of temporary incapacity due to common illness. The business decision was not grounded on any reason, while recognizing the unfair nature of the dismissal. In view of this situation, the worker requested for the dismissal to be declared null, maintaining that it was a decision based on the situation of temporary incapacity.

It was a brilliant opportunity to expand the material scope of Directive 2000/78. However, the CJEU maintained that sickness cannot be considered a disability, nor can it be added to those other grounds for which Directive 2000/78 prohibits any discrimination. This thesis, which was strongly criticized by the doctrine⁷, argues that disability should be conceptualized as a limitation *“[...]referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life”*⁸. Therefore, its meaning and scope must normally be given an autonomous and uniform

⁵ Consequently, the judgments Chacón Navas, C-13/05, ECLI: EU: C: 2006: 456; Coleman, C-303/06, ECLI: EU: C: 2008: 415; HK Danmark, C-335/11, ECLI: EU: C: 2013: 222; Z, C-363/12, ECLI: EU: C: 2014: 159; FOA, C-354/13, ECLI: EU: C: 2014: 2463; and, finally, Daouidi, C-395/15, ECLI: EU: C: 2016: 917, will be analysed. On the other hand, the judgments Odar, C-152/11, ECLI: EU: C: 2012: 772; Commission v Italy, C-312/11, ECLI: EU: C: 2013: 446; Glatzel, C-356/12, ECLI: EU: C: 2014: 350; Fenoll, C-316/13, ECLI: EU: C: 2015: 200; and, finally, Milkova, C-406/15, ECLI: EU: C: 2017: 198, are excluded, due to their low impact on disability protection.

⁶ As pointed out by CABEZA PEREIRO, J. “La discriminación por discapacidad; Caso Chacón Navas”, *Revista del Ministerio de Empleo y Seguridad Social*, no. 102, 2013, p. 299, this is the first time that the CJEU has analysed a case dealing with disability discrimination.

⁷ *Ibid.*, pp. 306-307, who defends a more social contextual model of disability, because of the lack of consideration of social or labour environmental factors. See also WADDINGTON, L., “Case C-13/05, Chacón Navas v. Eurest Colectividades SA, judgment of the Grand Chamber of 11 July 2006”, *Common Market Law Review*, no. 44, 2007, p. 491.

⁸ See paragraph 43 Chacón Navas Judgment.

interpretation throughout the Community⁹. The CJEU contends that the use of the concept of 'disability' is different from sickness, and in order to reinforce this argument¹⁰, it adds that it requires a long-term limitation¹¹. To that end, the Court argues that the protection provided by Directive 2000/78 to persons with disabilities, which is included in Article 5, takes into account a long-term factor and, consequently, does not protect those workers as soon as any sickness appears¹². Therefore, the CJEU assumes a definition of disability based on the International Classification of Functioning, Disability and Health (CIF) of the World Health Organization, understanding that disease, which is usually a stage prior to disability, is not protected by Directive 2000/78. Consequently, the exclusion of the protection of disease seeks to reflect a concept of disability that does not involve major disturbances in most Member States¹³.

Another important aspect is the assumption of the medical model by the CJEU¹⁴. Its approach focuses on highlighting the individual nature of the limitation of the illness in relation to professional life¹⁵. This characteristic confirms that we are facing a clear manifestation of the medical paradigm of treatment of disability, a circumstance that is incoherent, as other authors have already pointed out¹⁶, if we take into account how other institutions of the European Union have been strong advocates of the implementation of the social paradigm of treatment of disability since 1996¹⁷. Given this scenario, the Court's decision differs from the inclusive approach advocated by the social contextual model of disability, as CABEZA PEREIRO pointed out¹⁸.

Furthermore, the Chacón Navas Judgment does not offer legal solutions to situations that manifest long-term impairments that could be assimilated into disability. Chronic illness is the

⁹ On this issue see, among others, paragraph 11 of Ekro Judgment, C-327/82, and paragraph 32 of Commission/Spain, C-323/03 Judgment.

¹⁰ See paragraph 44 Chacón Navas Judgment.

¹¹ See paragraph 45 Chacón Navas Judgment.

¹² See paragraph 46 Chacón Navas Judgment.

¹³ CABEZA PEREIRO, J., "La discriminación por discapacidad...", *op. cit.*, p. 304.

¹⁴ WADDINGTON, L., "Equal to the Task? Re-Examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities" in QUINN, G. and FLYNN, E. (Dirs.), *European Yearbook of Disability Law*, vol. 4, 2013, p. 169.

¹⁵ See paragraph 43 Chacón Navas Judgment, which defines disability as " [...] limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life."

¹⁶ WADDINGTON, L., "Case C-13/05, Chacón Navas..." *op. cit.*, p. 492, which pointed out that "It is questionable how a definition of disability exclusively based on the medical model and which determines access to one of the key EC human rights instruments with regard to people with disabilities, fits into this bigger picture. At the very least, it could have been expected of the Court that it would refer to the position of the other EU institutions in its judgment and recognize the importance of the social model of disability".

¹⁷ See Communication of the Commission on Equality of Opportunity for People with Disabilities, 30th July 1996, "A New European Community Disability Strategy" [COM (96) 406 final] and Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Equal opportunities for people with disabilities: A European Action Plan (COM/2003/0650 final).

¹⁸ CABEZA PEREIRO, J., "La discriminación por discapacidad...", *op. cit.*, p. 316, who emphasizes the different point of view assumed in the Chacón Navas Judgment by the CJEU –closer to the medical model– and the reception of the social contextual model of disability by the European Parliament, Commission and Council.

clearest example. Although the Advocate General pointed out in his conclusions that the only exception to non-qualification as a disability are those long-term limitations that may arise during the course of the illness, the Court does not solve this very important question. The reasons seem to be to maintain a concept that does not involve major disturbances in Member States¹⁹, but with such an argument, the construction of a concept of autonomous and uniform disability is hampered.

The Coleman Judgment, C-303/06, ECLI:EU:C:2008:415, was another of the most important judgments regarding the material scope of Directive 2000/78. The CJEU examined whether the prohibition of discrimination on the grounds of disability in Directive 2000/78 also protects family members of people with disabilities, and whether workers receiving less favorable treatment because they have a child with a disability can be considered direct discrimination.

The preliminary questions in the Coleman Judgment arose in the context of the dismissal of a worker in United Kingdom, who had a child with disabilities. The argument put forward by the Court in this ruling represents a step forward and extends the protection conferred by Directive 2000/78 to situations of discrimination by association solely on grounds of disability²⁰. To that end, the Court argues that the protection conferred by the Directive seeks to combat all forms of discrimination based on disability, thus avoiding any application centered on a category of persons²¹. Directive 2000/78 contains measures that relate solely and exclusively to people with disabilities²². Consequently, it cannot be requested by the family members, but the CJEU points out that the provision of measures to take into account the needs of persons with disabilities does not lead to the conclusion that the principle of equal treatment should be interpreted restrictively, or in other words, as prohibiting only direct discrimination relating exclusively to people with disabilities²³. In this regard, the Court's argument focuses on Article 1 of Directive 2000/78, which concerns the fight against discrimination on the basis of disability and not exclusively for persons with disabilities.

¹⁹ *Ibid.*, p. 304. In this regard, see also QUINN, G. and FLYNN, E., "Transatlantic Borrowings..." *op. cit.*, p. 23, who argued that the CJEU defends a definition of disability whose economic impact is as small as possible for Member States.

²⁰ On this issue, see WADDINGTON, L., "Case C-303/06, S. Coleman v. Attridge Law and Steve Law, Judgment of the Grand Chamber of the Court of Justice of 17 July 2008", *Common Market Law Review*, no. 46, 2009, pp. 672-673, who points out that the Coleman Judgment does not extend the protection of non-discrimination by association to all the cases provided for Directive 2000/78, since the Court pays particular attention to the fact that Mrs Coleman provided the care required by her son, as well as the national situation of the different countries of the European Union differing in terms of protection from non-discrimination by association.

²¹ See paragraph 38 Coleman Judgment, C-303/06, EU:C:2008:415 and point 22 of the Opinion of Advocate General, C-303/06, EU:C:2008:61.

²² Clear examples are the obligation to provide reasonable accommodation (Article 5) and that the principle of equal treatment shall be notwithstanding the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration in the working environment (Article 7.2).

²³ See paragraph 43 Coleman Judgment.

At the same time, the CJEU referred to the duty to provide reasonable accommodation. Paragraph no. 42 of the Coleman Judgment identified this as a measure of positive action²⁴, which does not fit the conceptualization laid down in Directive 2000/78²⁵. The Court classified that obligation as a measure of positive action, which is surprising when examining Article 5 of Directive 2000/78, which makes it clear that the obligation to provide reasonable accommodation is a mandatory provision that all Member States must incorporate in their legal systems. One of the main features that define positive actions is that they are not obligations, so their implementation cannot be imposed on Member States. Furthermore, Article 2 CRPD establishes the failure to provide reasonable accommodation to be discriminatory behaviour on the basis of disability²⁶, and even the Commission itself proposes its implementation in the proposal for a Council Directive of 2 July 2008²⁷. In consequence, it is surprising that the Court should refer to reasonable accommodation as a measure of positive action, when we are faced with a clear obligation for Member States.

3.- The first judgment after the ratification of CRPD: Hk Danmark

HK Danmark Judgment, C-335/11, EU:C:2013:222 plays an essential role in characterizing the duty to provide reasonable accommodation, not only because it is the first sentence handed down following the ratification of CRPD by the European Union²⁸, but because it is the only judicial decision on this matter. The Court examines the situation of two workers from different companies, who were dismissed because of multiple absences to their job for reasons of health. Both, women workers, claim that their dismissal is discriminatory in the context of the national judicial procedure, because their health status prevents them from carrying out their duties and, consequently, they must be considered as people with disabilities. In fact, the workers add that the company had to offer them an hourly reduction under the duty to provide reasonable accommodation, *ex* Article 5 Directive 2000/78. The employers of both workers maintain that the medical situation of employees does not allow them to be considered as persons with disabilities, since their state of health only prevents them from providing full-time services. Furthermore, they

²⁴ In fact, the CJEU used the expression ‘positive action’, which is *somewhat strange*, as WADDINGTON, L. pointed out in “Case C-303/06, S. Coleman v. Attridge Law and Steve Law, Judgment of the Grand Chamber of the Court of Justice of 17 July 2008”, *Common Market Law Review*, no. 46, 2009, pp. 678 *in fine* and 679.

²⁵ WADDINGTON, L., “Case C-303/06, S. Coleman...” *op. cit.*, p.677.

²⁶ Discrimination on the basis of disability means *any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.*

²⁷ See article 2.5 of the proposal.

²⁸ The ratification was carried out by Council Decision 2010/48 / EC of 26 November 2009 on the conclusion by the European Community of the United Nations Convention on the Rights of Persons with Disabilities.

consider that the reduction of working time is not one of the measures referred to in Article 5 Directive 2000/78, and therefore there is no need to adapt working conditions.

This judgment has been one of the most important in disability issues, since it establishes a paradigm shift in the CJEU doctrine²⁹, thus it fully embraces the social-contextual model of disability³⁰. To this end, the CJEU establishes a connection between the concept of disability and the Convention, because of its approval by the European Union in 2009³¹. On this point, it should be noted that the HK Danmark judgment clarifies the interpretative value of the Convention, highlighting it as necessary³², pointing out that "[...] Directive 2000/78 must, as far as possible, be interpreted in a manner consistent with that convention"³³. If we consider the primacy of international agreements concluded by the European Union between interpreting the provisions of Secondary legislation, we can draw the conclusion that the Convention is at a higher level than Secondary legislation. It will play a key role interpreting the provisions of Directive 2000/78, and certain provisions could require a reinterpretation³⁴. However, this fact raises more immediate problems, such as who should assume implementation of provisions provided for in the Convention, as some of them are part of European Union shared competences³⁵.

Thus, the Court embraces the social-contextual model of disability and conceptualises it as "[...] a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers"³⁶. The introduction of

²⁹ Some authors, such as MOLINA NAVARRETE, C., "Discriminación por discapacidad y despido por absentismo: una interpretación correctora a la luz del "caso Ring", *Temas Laborales*, no. 130, 2015, pp. 140-144, argues that we are dealing with the evolution of the doctrine contained in the Judgment Chacón Navas, and not with a rectification of it.

³⁰ Judgment HK Danmark modifies the doctrine contained in Chacón Navas judgment, which departed from the inclusive approach institutionally defended by Parliament, the Commission and the Council since the Commission's Communication on the Equalization of Opportunities of Persons with Disabilities of 30 July 1996, Entitled "A new Community Strategy on Disability" (COM (96) 406 final) and the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Equal opportunities for people with disabilities: A European Action Plan (COM / 2003/0650 final).

³¹ Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (Ref. 2010/48/CE).

³² WADDINGTON, L., "The European Union and the United Nations Convention on the Rights of People with Disabilities: A Story of Exclusive and Shared Competences", *Maastricht Journal of European and Comparative Law*, no. 18, vol. 4, 2011, pp. 431-453, who has identified areas of overlapping of exclusive and shared competences of the European Union on which CRPD is based. See also DE BURCA, G., "The EU in the Negotiation...", *op. cit.*, pp.1-23.

³³ Paragraph 32 Judgment HK Danmark, C-335/11, EU:C:2013:222.

³⁴ WADDINGTON, L., "HK Danmark (Ring and Skouboe Werge): Interpreting the EU Equality Law in Light of the UN Convention on the Rights of Persons with Disabilities", *European Anti-Discrimination Law Review*, no. 17, 2013, p. 20.

³⁵ The provisions that are more problematic are those of control and follow-up of the implementation of CRPD (articles 31 to 33). To a greater extent, see WADDINGTON, L., "The European Union ...", *op. cit.*, p. 431-453, which states that the majority of Member States bear responsibility, since there is no provision requiring the European Union to act on matters whose competence is shared, even though it would be desirable for it to be carried out by the EU in order to harmonize the legal framework.

³⁶ Paragraph 38, Judgment HK Danmark, C-335/11, EU:C:2013:222.

participation in professional life crystallises the opening of the concept of disability, thereby expanding the possibility that the disease can be assimilated to the disability³⁷. It also means that the disability's origin is irrelevant to its determination³⁸. Therein, paragraphs 41 and 42 of judgment HK Danmark clarify that only those diseases which entail a professional limitation may be included in the concept of disability within the scope of the meaning of Directive 2000/78. Consequently, the Court does not add the disease as a new cause of discrimination, but permits the assimilation of it to disability, provided that the notes required by Article 1 of the Convention are met.

Thereupon, limitation of professional life constitutes a key element of the definition of disability. It should be noted, however, that while the CJEU's definition of a person with disability is a symbol of the integration of the social-contextual model into the interpretation of Directive 2000/78, the HK Danmark judgment leaves two questions unanswered: the meaning of long-term expression, which has recently been discussed in the Daouidi judgment³⁹, C-395/15, EU: C: 2016: 917, and the limitation of professional capacity in countries using a percentage to determine the grade of disability⁴⁰.

One point to note is the content of paragraph 43 of Judgment HK Danmark. It is responsible for specifying that the meaning of disability does not imply a total exclusion from work, but is rather an obstacle that hinders its development, or in other words, that limits the participation of the employee in their professional life, including partial limitations⁴¹. In this way, *the circumstance that the person concerned can work only to a limited extent is not an obstacle to that person's state of health being covered by the concept of "disability"*. The Court shows a clear desire to extend the protection of Directive 2000/78 to limit situations in which services can be

³⁷ MOLINA NAVARRETE, C., "Discriminación por discapacidad...", *op. cit.*, p. 143.

³⁸ BETSCH, N., "The Ring and Skouboe Werge Case: A Reluctant Acceptance of the Social Approach of Disability", *European Labour Law Journal*, no. 4, 2013, p. 140.

³⁹ Paragraphs 49 to 58 Judgment Daouidi, C-395/15, EU:C:2016:917 clarify that the expression "long term" must be analyzed by the national court with regard to the state of the person concerned at the date on which the allegedly discriminatory act is adopted against him, since it is a factual question. In this respect, CJEU establishes, as an evidence, that, on the date of the allegedly discriminatory event, "[...] the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or [...] the fact that that incapacity is likely to be significantly prolonged before that person has recovered" (par. 56).

For an in-depth study on the scope of this judgment, see WADDINGTON, L., "EHRC 2017/29 HvJ EU, 01-12-2016, C-395/15 Non-discriminatie, Handicap, Definitie van de grondhandicap, Begriplangdurigebeprekingen", *European Human Rights Cases (EHRC)*, no. 29, 2017; FERNÁNDEZ MARTÍNEZ, S., "Incapacidad temporal y discriminación por discapacidad: reflexiones al hilo del caso Daouidi", *Trabajo y Derecho*, no. 28, 2017, pps. 77-82; SÁNCHEZ PÉREZ, J., "¿Es discriminatorio despedir en situación de incapacidad laboral? Los nuevos límites comunitarios. Comentario a la Sentencia del Tribunal de Justicia de la Unión Europea de 1 de diciembre de 2016, asunto C-395/15", *Estudios financieros. Revista de trabajo y seguridad social* Comentarios, casos prácticos: recursos humanos, no. 406, 2017, p.173-177; and RODRÍGUEZ CARDO, I., "Despido de un trabajador en incapacidad temporal: ¿improcedencia o nulidad por discriminación?", *La Ley Unión Europea*, no. 43, 2016, pp. 1-6 (electronic version).

⁴⁰ WADDINGTON, L., "HK Danmark (Ring and Skouboe Werge)...", *op. cit.*, p. 21.

⁴¹ Point 44 of Opinion of Advocate General J. Kokkot, C-335/11 y C-337/11, EU:C:2012:775.

provided with limitations, encouraging work participation and accessibility of people with disabilities.

Regarding reasonable accommodation, paragraph 45 clarifies that the existence of a disability does not depend on the nature of the accommodation or the use of special equipment, since it would exclude physical and mental illnesses from its definition⁴². With this statement, CJEU indicates that the determination of a disability is an action prior to the need to provide reasonable accommodations. Therefore, the existence of a disability cannot consider the need to provide reasonable accommodation, because *"they are the consequence, not the constituent element, of the concept of disability"*⁴³.

The third question also focuses specifically on that duty. It seeks to clarify whether a reduction in working time may constitute an adjustment measure *ex* Article 5 Directive 2000/78. The importance of responding to this problem is not trivial, not only because this measure is not explicitly provided for in recital 20 of Directive 2000/78⁴⁴, but because the European standard doesn't specify if reasonable accommodation can be made as a part time measure. The solution proposed by CJEU favours the inclusion of the reduction of working time within the concept of "working patterns" provided for in recital 20, as an organisational measure *ex* Article 5 Directive 2000/78. For that, judgment HK Danmark holds an expansive interpretation of reasonable accommodation, on the grounds that the *voluntas legislatoris* did not intend to impose any restrictions on the inclusion of specific measures⁴⁵, giving priority to promoting the employment of people with disabilities, according to Article 2.4 of the Convention⁴⁶.

4.- Judgment Z and Judgment FOA: Towards an expansion of the concept of disability?

Judgment Z, C-363/12, ECLI:EU:C:2014:159 was another of the most important judgments regarding discrimination on the grounds of disability. In this case, a secondary school teacher suffering from a rare condition that prevented her from raising a child was examined. Ms. Z and her husband decided to resort to a surrogacy arrangement. The baby carried the genes of Ms. Z and her husband, but Ms. Z's employer maintained that she did not meet the legal requirements for

⁴² Point 42 of the Conclusions of Advocate General J. Kokkot, C-335/11 y C-337/11, EU:C:2012:775.

⁴³ Paragraph 46 of Judgment HK Danmark, C-335/11, EU:C:2013:222.

⁴⁴ This recital provides adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources as an example of possible measures.

⁴⁵ The key manifestation to this conclusion can be found in recital 20 Directive 2000/78, which uses the expression "i.e." to indicate measures that can be considered as reasonable accommodation. However, paragraph 54 judgment HK Danmark C-335/11, EU:C:2013:222, calls for the removal of barriers to achieve the full and effective participation of people with disabilities in working life, as an essential factor in justifying an expansive interpretation of concept "reasonable accommodation".

⁴⁶ See paragraph 53 Judgment HK Danmark, C-335/11, EU:C:2013:222, which states: *"In accordance with the second paragraph of Article 2 of the UN Convention, 'reasonable accommodation' is 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'. It follows that that provision prescribes a broad definition of the concept of 'reasonable accommodation'".*

maternity leave, since she had not been pregnant. In response to the refusal to grant the permit, Ms Z filed a claim against her employer alleging that she had been discriminated against on grounds of sex, family status and disability, without the employer having provided reasonable accommodation, as well as appealing against the refusal to grant her paid leave derived from her *in vitro* fertilization treatment.

There are a total of six questions, which can be divided into two groups: the denial of paid leave equivalent to maternity and / or adoption leave can be considered discrimination on the grounds of sex (first and second questions) or disability (third and fourth questions) and compatibility between the CRPD and Directive 2000/78 (fifth and sixth questions).

This judgment is not particularly innovative regarding the conceptualization of disability, since it does not add anything to the view taken by the CJEU in the HK Danmark Judgment. The Court, in the context of the third and fourth questions, expressed the need for a limitation, arising from long-term physical and mental impairment or mental illness, and which prevents full and effective participation in professional life on an equal basis with other workers. The Court maintained that the impossibility of having children should be considered a long-term limitation⁴⁷, but that it does not prevent access, exercise or progress in employment⁴⁸. Such a conclusion is surprising, as the court offered a particularly restrictive interpretation of participation in professional life.

On this issue, the CJEU limited the scope of disability, based on a purely medical view, which does not coincide with the new vision advocated by the CRPD. The impossibility of having children inevitably affects the sphere of employment rights, because it prevented her from benefitting from maternity leave - which is the central issue of discussion in the framework of the lawsuit. This right relates to the material scope of the directive provided for in Article 3.1.c of Directive 2000/78⁴⁹, and therefore generates a limiting impact on the worker's professional life.

Where Judgment Z stands out is in its response to the fifth and sixth questions, namely the validity of Directive 2000/78 in relation to the CRPD. The Court is responsible for assessing its validity in the light of the CRPD, the latter instrument having been declared to be superior to secondary legislation due to its international nature⁵⁰. And the Tribunal's response programmatically qualifies the obligations noted in Articles 4.1 and 4.3 CRPD⁵¹, since they are subject to the adoption of subsequent acts by the contracting parties. In this view, the Court removed any existing possibility of conferring direct effect on the provisions of the CRPD, since its

⁴⁷ See paragraph 79, Judgment Z, C-363/12, EU:C:2014:159.

⁴⁸ See paragraph 81, Judgment Z, C-363/12, EU:C:2014:159.

⁴⁹ WADDINGTON, L., "Saying All the Things and Still Getting it Wrong. The Court of Justice's Definition of Disability and Non-Discrimination Law", *Maastricht journal of European and comparative law*, vol. 22, no. 4, 2015, p. 585.

⁵⁰ See paragraph 32 HK Danmark Judgment, C-335/11, EU:C:2013:222 and point 79 of the Opinion of Advocate General, C-363/2012, ECLI:EU:C:2013:604.

⁵¹ See paragraph 88, Judgment Z, C-363/12, EU:C:2014:159.

content, in connection with the actions of the contracting parties, cannot be regarded as unconditional and sufficiently precise⁵². Consequently, the CJEU ruled out the possibility of the validity of Directive 2000/78 being called into question in the light of the CRPD⁵³.

Judgment FOA, C-354/13, ECLI:EU:C:2014:2463, was another opportunity to continue to expand the concept of disability to unfortunately widespread pathologies in Western societies, such as obesity. In this case, a child caregiver, Mr. Kaltoft, was considered to be obese as defined by the World Health Organization, and always had been since he started working for his his employer. After a reduction in the workload associated with his job, it was decided that Mr. Kaltoft should be the only person dismissed as a result of the decrease in the alleged workload. The worker understood that the business decision was solely based on his obesity, arguing that the termination of his contract was discriminatory.

Given this situation, a total of four questions are being referred to the CJEU, which is seeking to clarify whether obesity is a protected cause of discrimination under Union law, and more specifically, whether it can be considered a disability for the purposes of the protection provided by Directive 2000/78. In particular, the issues raised are: (a) the possibility of obesity being included within the scope of protection of European Union law on fundamental rights, (b) whether there should be prohibition of discrimination on the grounds of obesity, with legal protection based on Directive 2000/78, regarding relationships between a national and a public employer, (c) to examine whether a possible prohibition of discrimination on the basis of obesity was infringed in accordance with the rules on payment of the burden of proof and, finally, (d) whether obesity can be considered a disability for the purposes of the protection offered by Directive 2000/78 and, if so, what criteria would be decisive in such situations.

This judgment analyzes a new issue in Europe, but not in other countries⁵⁴, that offers a solution for discrimination situations that are not explicitly provided for in Directive 2000/78. The CJEU is particularly cautious about the recognition of obesity as a cause of discrimination⁵⁵, and therefore prohibits the possibility of its direct protection under Directive 2000/78⁵⁶, mainly because of its lack of recognition in Article 1. However, it is recognized that obesity is protected by Directive 2000/78, through its assimilation with disability. To that end, a worker's obesity must

⁵² On the meaning of the expression “unconditional and sufficiently precise”, see *Air Transport Association of America Judgment*, C-366/10, EU:C:2011:864, paragraphs 54 and 55; *Judgment Intertanko*, C-308/06, EU:C:2008:312, paragraph 45; *Demirel/Stadt Schwäbisch Gmünd Judgment*, C-12/86, EU:C:1987:400, paragraph 14; *Pêcheurs de l'étang de Berre Judgment*, C-213/03, EU:C:2004:464, paragraph 39.

⁵³ See paragraph 90, *Judgment Z*, C-363/12, EU:C:2014:159.

⁵⁴ RIVAS VALLEJO, P., “¿Es la obesidad causa de discriminación laboral? Diálogo a tres bandas: Derecho norteamericano, Derecho comunitario y Derecho español, paper presented in XXVI Jornades Catalanes de Dret Social, 2015, who examines the American and Canadian solutions to the obesity issue.

⁵⁵ In this regard, see RIVAS VALLEJO, P., “¿Es la obesidad causa de discriminación laboral? Diálogo a tres bandas: Derecho norteamericano, Derecho comunitario y Derecho español, paper presented in XXVI Jornades Catalanes de Dret Social, 2015, p. 15.

⁵⁶ See paragraph 58, *Judgment FOA*, C-354/13, EU:C:2014:2463, which stated that obesity, by nature, does not necessarily entail the existence of a limitation that may hinder full and effective participation of the person concerned in professional life on an equal basis with other workers

share the characteristics provided for in the CRPD⁵⁷: a long-term limitation that may hinder full and effective participation in the professional sphere. It should be noted that the possibility of including obesity in antidiscriminatory protection *ex* Directive 2000/78 is based on the fact that the concept of 'disability' *does not depend on the extent to which the person may or may not have contributed to the onset of his disability*⁵⁸.

In this context, the 'long-term' requirement must be interpreted in relation to the manifestation of the limitation during the working relationship, and it can be argued that it can be appreciated as long as it exists from the start of employment. However, the Court missed an excellent opportunity to more precisely develop the way in which this requirement should be interpreted in relation to other factors, since linking it to employment may raise problems involving legal consistency in those relationships of shorter duration⁵⁹.

In any case, the FOA judgment calls for a broad definition of the concept of disability, which seeks to protect situations that are not expressly recognized by its assimilation to disability, thus indirectly extending the antidiscriminatory protection provided by Directive 2000/78.

5.- The final step of the CJEU in disability protection: Daouidi Judgment

The most recent judgment on the grounds of disability is the Daouidi Judgment, C-395/15, ECLI:EU:C:2016:917. In this case, the CJEU analyzed the situation of a temporary worker who, as a result of an accident at work, began a period of temporary incapacity of uncertain duration. After a month, Mr. Daouidi received written notice of his dismissal on disciplinary grounds. The main issue here is the possibility of assimilating temporary incapacity resulting from an accident at work and of uncertain duration to the concept of disability. To that end, a total of five preliminary questions are discussed⁶⁰, of which the third⁶¹ and fifth questions⁶² are especially important.

In general terms, the CJEU has focused on answering the fifth question. On the basis that an accident at work can be a cause of disability⁶³, there is a clear desire to clarify the concept of 'long-term' in relation to the limitation of participation in professional life, which is not defined by

⁵⁷ See paragraph 59, Judgment FOA, C-354/13, EU:C:2014:2463.

⁵⁸ See paragraph 56, Judgment FOA, C-354/13, EU:C:2014:2463.

⁵⁹ In Judgment FOA, C-354/13, EU:C:2014:2463, the employee (Mr. Kaltoft) was obese since the beginning of the working relationship, but the CJEU maintains that "[...] *Mr Kaltoft was obese for the entire period he was employed by the Municipality of Billund, thus for a long period*".

⁶⁰ See paragraph 33, Daouidi Judgment, C-395/15, ECLI:EU:C:2016:917.

⁶¹ The third question of the preliminary ruling was: "*Would a decision of an employer to dismiss a worker, previously well-regarded professionally merely because he was subject to temporary incapacity — of uncertain duration — as a result of an accident at work, when he is receiving health assistance and financial benefits from Social Security, come within the ambit and/or protection of Articles 3, 15, 31, 34(1) and 35(1) of the Charter (or any one or more of them)?*"

⁶² The fifth question of the preliminary ruling was: "*If the four foregoing questions should be answered in the negative, would the decision of an employer to dismiss a worker, previously well-regarded professionally, merely because he was subject to temporary incapacity — of uncertain duration — by reason of an accident at work, be caught by the term "direct discrimination on grounds of disability" as one of the grounds of discrimination envisaged in Articles 1, 2 and 3 of Directive 2000/78?*"

⁶³ See paragraph 44, Daouidi Judgment, C-395/15, ECLI:EU:C:2016:917.

the CRPD⁶⁴. In this regard, the CJEU states that the fact that the legal system for temporary incapacity is applied to Mr. Daouidi cannot exclude the qualification of the limitation as long-term⁶⁵. The CJEU intends to depart from formalistic limitations and pay exclusive attention to the medical condition on the date on which the allegedly discriminatory decision was adopted⁶⁶. In addition, the Daouidi Judgment clarifies some important practical aspects regarding the duration requirement, stating that this is a purely factual issue on which the national court must rule⁶⁷. For example, the analysis of this circumstance must be carried out with regard to the state of the person concerned on the date when the allegedly discriminatory action was adopted against them⁶⁸, the evidence to determine that the limitation is lasting being that the incapacity of the person concerned does not present a well-defined perspective in terms of its short-term progress⁶⁹, and lastly, the proof of durability must be based on all the available objective elements, in particular documents and certificates relating to the medical condition of that person⁷⁰.

On the other hand, the fact that the analysis of ‘long-term duration’ is referred to the national court is striking. Until now, the only case in which the need to assess the long-term requirement was expressly upheld by the Court, in the context of FOA, Case C-354/13 ECLI:C:2014:2463⁷¹. However, the Daouidi Judgment, C-395/15, ECLI:EU:C:2016:917 chooses to redirect the determination of this requirement to the national court. This change is much more consistent with CJEU doctrine, because dealing with a purely factual issue and referral to the national court helps ensure that the legal construction is completely objective.

Likewise, the Court does not rule on the time required to be considered a disability. The Daouidi Judgment shows that among the indications to appreciate its concurrence is the existence of any limitation that *does not display a clearly defined prognosis as regards short-term progress*⁷². However, this construction does not offer coverage in overdue situations. The Daouidi judgment excludes from protection situations the likes of those which present *prima facie* short-term termination but which, due to any medical complication, may increase recovery time, resulting in long-term situations, or even change to an uncertain recovery period. On the contrary, it protects

⁶⁴ See paragraph 49, Daouidi Judgment, C-395/15, ECLI:EU:C:2016:917.

⁶⁵ See paragraph 52, Daouidi Judgment, C-395/15, ECLI:EU:C:2016:917. The influence of point 49 of the Opinion of the General Advocate, C-395/15, ECLI:EU:C:2016:371, is clearly reflected in paragraph 59 Daouidi Judgment, because the CJEU considered that “*the fact that the person concerned finds himself or herself in a situation of temporary incapacity to work, as defined in national law, for an indeterminate amount of time, as the result of an accident at work, does not mean, in itself, that the limitation of that person’s capacity can be classified as being ‘long-term’, within the meaning of the definition of ‘disability’ laid down by that directive, read in the light of the UN Convention*”.

⁶⁶ See paragraph 53, Daouidi Judgment, C-395/15, ECLI:EU:C:2016:917, which refers to paragraph 29 Chacón Navas Judgment, C-13/05, EU:C:2006:456.

⁶⁷ See paragraph 55, Daouidi Judgment, C-395/15, ECLI:EU:C:2016:917.

⁶⁸ See paragraph 53, Daouidi Judgment, C-395/15, ECLI:EU:C:2016:917. In this regard, see also paragraph 29 Chacón Navas Judgment C-13/05, ECLI:EU:C:2006:456.

⁶⁹ See paragraph 56, Daouidi Judgment, C-395/15, ECLI:EU:C:2016:917.

⁷⁰ See paragraph 57, Daouidi Judgment, C-395/15, ECLI:EU:C:2016:917.

⁷¹ See paragraph 61, Judgment FOA, C-354/13, ECLI:EU:C:2014:2463.

⁷² See paragraph 56, Daouidi Judgment, C-395/15, ECLI:EU:C:2016:917.

long-term medical recovery situations that, due to medical or personal circumstances, may undergo a substantial improvement in the recovery time as originally planned, which would transform the temporary nature of the long-term limitation into a short-term limitation.

In fact, the lack of clarity on this point raises another question: for how long can Member State legislations set a long-term limitation? Authors like WADDINGTON pointed out that a 12-month period, such as that established by the Disability Discrimination Act of 1995 in the United Kingdom⁷³, is compatible with European Union law⁷⁴. In legal situations in which domestic law does not establish a period of time as a reference to evaluate the concept of ‘long-term’, the Daouidi Judgment is clear enough, because it determines that a period of 6 months is long enough for this to be appreciated⁷⁵.

The final critical point to note is that the CJEU continues to maintain certain distance from a complete application of the social-contextual model of disability. Under the heading of ‘objective elements’ *ex* paragraph 57 of the Daouidi Judgment, the Court highlights the importance of medical documents and certificates. It shows a certain disagreement regarding the application of the social contextual model of disability advocated by the CRPD, since any reference to the impact of environmental barriers, which may play a key role in assessing this requirement, is omitted. In fact, the exclusive use of medical indicators is especially harmful to mental illnesses, which are characterized by showing medical symptoms that are not manifested in a regular and predictable manner⁷⁶.

Moreover, the Daouidi Judgment continues to expand the concept of disability⁷⁷, in order to cover as many situations as possible, and, consequently, to extend the protection of Directive 2000/78. This trend has a direct impact on the duty to provide reasonable accommodation, as it substantially increases the number of situations in which this anti-discrimination measure may be required. However, it should be noted that an extension of the concept of disability will generate a future need to specify the protection offered by Directive 2000/78. Disability is a dynamic concept, and as such, the European legislator should offer different degrees of protection so as not to forget the inherent diversity of people with disabilities⁷⁸.

⁷³ This standard is only applied in Ireland, as WADDINGTON, L. pointed out in “EHRC 2017/29...”, *op. cit.*, p. 9.

⁷⁴ WADDINGTON, L., “EHRC 2017/29...”, *op. cit.*, p. 9.

⁷⁵ WADDINGTON, L., “EHRC 2017/29...”, *op. cit.*, p. 9.

⁷⁶ WADDINGTON, L., “EHRC 2017/29...”, *op. cit.*, p. 10. For a further discussion of this topic, see BELL, M. and WADDINGTON, L., “The Employment Equality Directive and supporting people with psychosocial disabilities in the workplace: a legal analysis of the situation in the EU Member States”, European Commission, 2016.

⁷⁷ CARDO RODRÍGUEZ, A. I., “Despido de un trabajador en incapacidad temporal...”, *op. cit.*, p. 3 (electronic version).

⁷⁸ For example, people with mental illness have to deal with more obstacles than persons with a physical disability. However, Directive 2000/78 offers them the same protection, based on the concept of person with disability. For a further discussion of this issue, see WADDINGTON, L., “Not Disabled Enough: How European Courts Filter Non-discrimination Claims Through a Narrow View of Disability”, *European Journal of Human Rights*, no. 1, 2015, pp. 11-35.

6.- Conclusion

At an early stage, i.e. before the ratification of the CRPD, disability discrimination was not an important issue for the CJEU. It is a direct consequence of the low number of European standards that offer protection on the grounds of disability, but also of the interpretation of disability protection in the light of the medical model of disability. The Chacón Navas and Coleman Judgments were an early approach to the importance of disability discrimination. However, the CJEU embraces the medical model of disability. The two judgments represented a limited approach to the protection of Directive 2000/78, in terms of both the individual nature of the limitation of the illness in relation to professional life and of not expanding the protection of Directive 2000/78 to situations of discrimination by association. That was a brilliant opportunity to expand the material scope of Directive 2000/78, in line with the institutional effort to implement the social contextual model of disability, but the CJEU was far removed from the inclusive approach advocated by the social contextual model of disability.

The ratification of the CRPD was a step forward in terms of inclusion and protection of people with disabilities, and its effects led to a reinterpretation of the protection of disability by the CJEU, as can be seen from the HK Danmark Judgment. The social-contextual model of disability was finally integrated in the doctrine of the CJEU, using the existence of a limitation that hinders participation in professional life as a key element of the definition. In consequence, the CJEU maintains an expansive interpretation of reasonable accommodation, giving priority to promoting the employment of people with disabilities. However, the HK Danmark Judgment leaves two questions unanswered: the meaning of long-term expression and the limitation of professional capacity in countries using a percentage to determine the degree of disability.

The CRPD's definition of disability raised new questions for the CJEU regarding the determination of specific situations as a disability. Judgment Z & Judgment FOA are clear examples of the new challenges arising from a definition of disability based on a social-contextual model, but the CJEU has not been particularly innovative at proposing solutions. The CJEU defends a limited scope of disability, only based on the effect on professional participation, and which has an impact on the expansion of the disability concept. Judgment Z was more restrictive than Judgment FOA, since it excludes the impossibility of having children from being considered a disability. But it does concern the sphere of employment rights, because it prevented a woman from receiving maternity leave. Judgment FOA is also particularly cautious about the recognition of obesity as a cause of discrimination, and prohibits the possibility of its direct protection under Directive 2000/78. However, the CJEU recognized that obesity could be protected by Directive 2000/78, but only if it impedes full and effective participation in the professional sphere; and is a long-term limitation.

The final step of the CJEU in disability protection was the Daouidi Judgment. In this case, the CJEU focuses on the second key element of its definition of disability, namely the temporary

nature of the limitation (long-term impairment). The CJEU intends to depart from formalistic limitations and pay attention solely and exclusively to the medical condition of the person concerned on the date on which the allegedly discriminatory decision is adopted against him/her. But it introduces medical elements to the social-contextual model of disability, and consequently, the Court still maintains a certain distance from a complete application of the social paradigm of disability. Under the heading of ‘objective elements’ *ex* paragraph 57 of the Daouidi Judgment, the Court highlights the importance of medical documents and certificates. It shows a certain disagreement regarding the application of the social contextual model of disability advocated by the CRPD, since any reference to the impact of environmental barriers, which may play a key role in assessing this requirement, is omitted.